

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

No. 76-1109.

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**United States Court of Appeals for the
Second Circuit.**

No. 76-1109.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

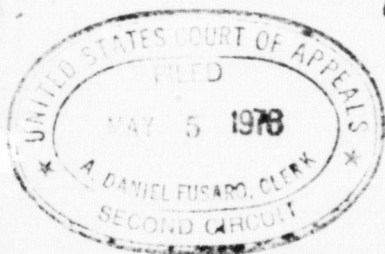
PASQUALE INTRIERI,
DEFENDANT-APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Brief for the Defendant-Appellant.

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Issues Presented.

I. Whether the verdict of the jury was not supported by the evidence in that it failed to establish, with reasonable certainty, the defendant's net worth as of December 31, 1967.

II. Whether the court improperly discharged its judicial function and thereby denied the defendant a fair trial by:

(A) making remarks in the presence of the jury which tended to imply that there existed a burden of proof upon the defendant to come forward with evidence to prove the existence of non-taxable income receipts such as repayments of capital investments or loans, etc.;

(B) calling to the government's attention, *sua sponte*, possible capital gain consequences of a specific transaction involving the defendant during the prosecution years and thereafter allowing the prosecutor to negate and contradict the stipulation entered into by the government and accepted by the court regarding this same transaction;

(C) making statements in the presence of the jury, in the nature of testimony, concerning certain obligations which the defendant might have had to filing particular schedules on his income tax returns;

(D) calling to the government's attention that the charts prepared by the prosecution, containing all alleged expenditures made by the defendant during the prosecution years, contained no figures reflecting necessary living expenses;

(E) referring in its charge to the jury that this was an "unusual" case because of the coincidence of three different people who had cash hoards.

III. Whether the court erred in allowing the government's tax expert to answer a hypothetical question concerning the possibility of a long term capital gain being due by virtue of the sale of real property inherited by the defendant in 1948 and subsequently sold in 1971, a hypothetical for which there existed no evidentiary foundation.

IV. Whether the court erred in permitting the government to introduce evidence of alleged subsequent consistent acts in years not embraced by the indictment in an attempt to retroactively show the defendant's wilful intent to commit acts alleged in the indictments.

V. Whether the court erred by abusing its discretion in allowing the government to reopen its case-in-chief, subsequent to the close of the defendant's case, in order to present evidence allegedly establishing a "starting point" by negating assets available to the defendant prior to January 1, 1968, which may have been utilized to make the

expenditures reflected during the years embraced by the indictments.

VI. Whether the court erred in allowing the prosecutor, in his rebuttal summation, to refer to the defendant's constitutional election not to testify.

Statement of the Case.

The defendant was indicted on April 15, 1975, in indictment no. 75-CR-297. The indictment contained two counts: the first charged a violation of 26 U.S.C. § 7201, alleging that the defendant understated a substantial amount of his income, and the second charged the defendant with filing a false income tax return, in violation of 26 U.S.C. § 7206(1). Both counts were predicated upon defendant's filing his 1968 tax returns. A second indictment was returned by the grand jury on September 19, 1975, indictment no. 75-CR-690. The second indictment contained six counts. Counts 1, 3 and 5 charged a violation of 26 U.S.C. § 7201 in that the defendant failed to report a substantial amount of his actual income for the years 1969, 1970 and 1971. The remaining three counts in the second indictment charged the defendant with filing a false income tax return for each of the respective years, in violation of 26 U.S.C. § 7206(1). Both indictments were consolidated for trial (A. 1-8).

Statement of Facts.

The gist of both indictments charged the defendant with understating his taxable income and thereby evading a substantial amount of tax then due and owing to the government, and further, knowingly and wilfully filing a false income tax report under oath. The government elected to

proceed to prove the allegations enumerated in the indictments by the "expenditure method" of proof. At the discovery stage, the government (in response to questions posed in the defendant's motion for bill of particulars) set forth the nature and extent of their anticipated evidence relative to the "expenditure method" of proof. In his bill of particulars, question I(D), the defendant requested to be furnished with the government's net worth calculations as of December 31, 1967. The government responded by stating that said information was "not applicable."

The trial of this cause commenced on January 6, 1976, before the Honorable Orrin Judd in the Eastern District of New York. Government counsel, in his opening statement, enumerated the nature of the government's anticipated evidence and explained to the jurors the manner in which this evidence could be used by them in concluding that the defendant actually received more income during the prosecution years than he reported on his income tax returns. The prosecutor stated:

"Now, specifically in this case, since it's an income tax case, there is a method employed which establishes income by circumstantial evidence. Now, you will hear from Judge Judd later that circumstantial evidence is equally valid and just as valid as direct evidence.

"Now, we expect to prove the charges in this case by an analysis of the defendant's expenditures during the years in question. In other words, we expect to show his true income for 1968, 1969, 1970 and 1971, by showing how much he spent during those years and how he spent it.

"Now, I think that it will become abundantly clear to you when you hear the evidence in showing how much the defendant spent, *we are going to compare that to how much he said he made during those years*

in order to establish his true income. In other words, you—on the one hand—you are going to have a list of what he spent, and in the other hand, you are going to have his income tax return showing what he made, and then the comparison of the two, and then with certain arithmetic deductions, which the agents for the Internal Revenue Service will give you, a picture, I submit, of really what his income was during those years." (Emphasis supplied.)

Numerous witnesses were called by the government in an attempt to detail with specific particularity the nature and amount of defendant's expenditure for each of the years reflected in the indictments. The government also set out to describe the amounts of income received by the defendant during the years embraced by the indictments as reflected on his income tax returns. The vast majority of the witnesses called by the government were keepers of records for either the payroll department for the city of New York Police Department or various banks at which the defendant maintained accounts. The government also called sundry owners and employees of retail businesses from whom the defendant acquired goods or services during the years embraced by the indictments.

In the course of the government's case, it called as its witness the defendant's ex-wife, Joan Intrieri. The parties were divorced in April, 1968. Joan Intrieri testified concerning alimony and support payments which were made to her by the defendant pursuant to a separation agreement entered into on or about March 15, 1968 (Tr. 93-95).¹ The witness also testified to certain additional sums of money given to her by the defendant for vacations for her and the defendant's children by their marriage (Tr. 99-100). Further, she testified to additional sums of money occa-

¹ "Tr." refers to pages of the trial transcript.

sionally given to her by the defendant to assist her in the operation of her household (Tr. 100).

Joan Intrieri continued her testimony by stating that she had purchased an automobile in 1971 for approximately \$4,500, and that the defendant had contributed approximately \$2,000 towards said purchase (Tr. 102). The witness also stated that in 1971, the defendant made payments towards the mortgage on the home in which the parties had resided while living as husband and wife and in which the witness continued to reside. She testified that the amount contributed by the defendant in 1971 was approximately \$2,149.96 (Tr. 106-107). Joan Intrieri testified that around the time of these mortgage payments, her financial position "was getting tight" (Tr. 112).

The defendant's counsel specifically questioned Joan Intrieri relative to her independent knowledge of assets possessed by the defendant prior to 1968:

"Q. As of your divorce, which occurred in April of 1968, do you know, of your own personal knowledge, whether Mr. Intrieri, my client, had any sizable amount of cash available to him, whether it be in his home or in bank accounts or what have you?

"A. I know he had the house. I don't know what else he had" (Tr. 113-114).

The government continued its presentation of evidence by calling the defendant's mother-in-law, Florence Babio, the defendant's brother, Nicholas Intrieri, and the defendant's mother, Julia Lamanda. Each of the above individuals had been previously summoned to appear and testify before the grand jury. Each of the respective witnesses testified before the grand jury and at trial concerning certain expenditures made by them which the government attributed to the defendant. Each of the respective wit-

nesses testified to having accumulated various amounts of cash which were subsequently used to make the expenditures in question.

The government, after having called these witnesses, proceeded to attempt to impeach their testimony. The government presented evidence concerning its investigation into the financial history of the respective witnesses (in regards to the defendant's mother and mother-in-law, their former husbands' financial history), in an attempt to establish thereby the improbability of each having been able to accumulate the amounts of money to which they testified.

During the course of trial, on January 12, 1976, after the morning session, the court asked the prosecutor if there were any matters he wished to bring before him at the time. The prosecutor informed the court of his intention to call four witnesses with regard to two subsequent acts. The prosecutor stated that he intended to offer evidence as to a transaction that occurred in 1972 and made an offer of proof as reflected at pages 740-741 of the trial transcript. He also informed the court that he intended to offer a subsequent act which occurred in February of 1975, involving the purchase of a Mercedes Benz automobile (Tr. 742). Defense counsel objected to the admission of both subsequent acts. The court allowed testimony on both matters over defense counsel's objection.

As the trial proceeded, the trial judge made certain remarks relative to testimony being offered. The effect of these remarks tended to indicate that there was a burden upon the defendant to come forward with evidence. The remarks of the court are reflected at pages 846-848 of the trial transcript.

Special Agent Anthony Valenti from the intelligence division of the Internal Revenue Service was called as a witness by the government. Agent Valenti supervised and conducted the investigation of the defendant. Agent Va-

lenti's testimony (which begins at page 994 of the trial transcript) began by explaining generally the matter of non-taxable receipts. His testimony continued by explaining the receipt of non-taxable income received by the defendant during the prosecution years. He testified as to certain investigations done by him and under his supervision concerning an attempt to ascertain the receipt of non-taxable income by the defendant during the prosecution years. Agent Valenti's testimony was completely devoid of any evidence uncovered by him which would have any probative value in attempting to ascertain the defendant's net worth as of December 31, 1967. Throughout Agent Valenti's testimony, he was neither asked, nor did he testify to any assets which might have been possessed by the defendant prior to the prosecution years which may have been used by the defendant for the expenditures alleged from 1968 through 1971 (Tr. 994-1004).

Agent Valenti's testimony was interrupted so that the government might recall one of its previous witnesses in order to ascertain the exact amount of money received by the defendant by virtue of a sale of property inherited by the defendant in 1948 and subsequently sold in 1971. As the trial proceeded, a discrepancy arose between the prosecutor and defendant's counsel as to the exact amounts of money received pursuant to said sale.

During the discovery stage of the proceedings, and continually thereafter, the government had consistently treated these assets as non-taxable in their entirety. It had been stipulated by and between defendant's counsel and the government that whatever was received pursuant to said sale was non-taxable. The prosecutor stipulated in open court, before the jury, that whatever amount was received by the defendant was a non-taxable receipt which could be used by him in the year 1971 (Tr. 1018).

After some discussion between the prosecutor and counsel for the defendant concerning the actual amount of money received by the defendant from the sale of the property, the prosecutor stipulated with defendant's counsel that \$21,420.02 was received by the defendant and that said sum was non-taxable. The prosecutor, again in open court, said:

Mr. Puccio: Your Honor, after Mr.—The defense counsel and I spent a great part of our lunch hour—Mr. Cintolo and I, I should say—working on this non-taxable item and we have a stipulation after speaking with Mr. Thayer who is the attorney for the mortgagee . . .

“We will stipulate that \$21,420.02 was received in 1971 by the Defendant and it is not taxable income” (Tr. 1028).

Thereafter, the court, sua sponte, brought to the prosecutor's attention that this matter could not be determined to be non-taxable unless and until the tax base was established for the property at the date of death of defendant's paternal grandmother, with regard to the possible existence of a long term capital gain which the defendant had not reported in his income tax return for the year of the transaction. In response to the court's remarks, the prosecutor asked to be relieved of his stipulation. The court responded by saying:

“The Court: It may have been a stipulation without adequate factual basis. But, if the Government makes a stipulation, I will take it . . . (Tr. 1030).

The prosecutor then recalled Agent Valenti, and in the course of his examination questioned him concerning the sale of the real estate, specifically with regard to the obligation of the defendant to list said transaction on an appro-

priate federal tax form. The government still conceded that they would treat said receipts as non-taxable income, but continued to question witnesses regarding the possibility of a tax being due and owing on said transaction (Tr. 1082-1084). During Agent Valenti's continued testimony, he proceeded to explain the "charts" which had been prepared under his direction detailing the expenditures allegedly made by the defendant. Nevertheless, these charts had been given to the defendant's counsel prior to trial, and the defendant's counsel did accordingly rely upon the prosecutor's use thereof without modification of any nature. Upon viewing the charts, the court, sua sponte, brought to the prosecutor's attention that the charts being offered into evidence did not reflect normal living expenses such as food, heat and clothing. The trial court stated:

"The Court: Why didn't you put living expenses on there? I don't see anything about heat and clothing and food" (Tr. 1030).

Thereafter, the prosecutor continuously brought to the jury's attention that the charts offered into evidence by the government, did not contain normal living expenses.

Further in the testimony of Agent Valenti, the court, in response to an objection made by the defendant's counsel with regard to questions being posed to Agent Valenti concerning the proper tax treatment to be afforded the receipts of money obtained by virtue of the sale of real property in 1971, stated before the jury:

"The Court: I am saying he should have filed Schedule "D" showing a capital gain or loss, and that his failure to do so can be considered as bearing on his intent to file an honest return" (Tr. 1089).

The prosecutor then called Mr. Sidney Buchbinder, a technical advisor for the regional counsel for the North Atlantic Region. The prosecutor questioned Mr. Buchbinder concerning the property located at 923 East 221st Street in the Bronx, which had been inherited by the defendant from his paternal grandmother, Maria Intrieri, in 1948. The witness was questioned as to whether or not it could have been determined that there was taxable income received by the defendant from said sale. The prosecutor asked:

“Question: Taking then into consideration the property in 1948 when inherited was worth approximately \$5,600 and that the same property was sold in 1971, some twenty-two years later, and at the time over \$20,000 approximately was received by the person selling it as profit. Could you tell us if there is any tax due and owing based upon that transaction?” (Tr. 1101.)

The defendant's counsel objected to said questions based upon his contention that the government could not in the same breath concede and treat the receipt of funds from said sale as non-taxable assets for the purpose of their computations, and at the same time elicit evidence to show that a tax may be due and owing on the receipts from said sale. The defendant's counsel also contended that the form of the hypothetical question was improper in that the expert was not supplied sufficient facts upon which he could render a professionally intelligent decision. Both objections were denied by the court, and Mr. Buchbinder was allowed to answer, in substance, that a long term capital gain tax should have been paid.

At the close of the government's case, the defendant filed a motion for a directed verdict of acquittal. Said motion set forth as its predicate that the government had failed to establish with reasonable certainty the defendant's open-

ing net worth. The defendant's counsel reserved his rights to argue his motion and commenced to present the defendant's case.

The defendant called two witnesses to testify in his defense. The first witness was an attorney who testified concerning a lawsuit which had been commenced against the defendant's brother, in support of the brother's testimony of his reluctance to deposit cash assets in banks for fear of attachment. The second witness testified concerning the existence of a metal box embedded in cement in the defendant's mother's home, in support of her testimony which referred to said metal box as having contained a cash hoard. After calling these two witnesses, the defense rested its case. After the defendant's case was presented, the court heard arguments concerning the defendant's motion for a judgment of acquittal. Said motion was denied.

The government moved the court to reopen its case in order to present certain documents and exhibits which would allegedly show the unavailability of certain assets possessed by the defendant prior to the prosecution years, and to further show that these assets were not used to make any of the alleged expenditures during the prosecution years. The defendant's counsel duly objected, contending that said evidence was not proper rebuttal, and further contending that it was simply an attempt by the government, after having viewed the motion for a directed verdict, to attempt to establish a "starting point" and shore up its case against the defendant. The court, in response to the defendant's counsel's argument, stated that he made no distinction between rebuttal and reopening. The defendant's objection was denied, and the government was allowed to reopen its case in order to present certain documents to attempt to establish a "starting point." During the course of the prosecutor's summation to the jury, he stated, in substance, that there existed no evidence that

expenditures by the defendant in the years 1968 through 1971 had been received by him prior to January 1, 1968 (Tr. 1137-1141).

The defendant's motion for a directed verdict of acquittal was renewed at the close of the entire case and denied by the court.

Argument.

I. THE VERDICT OF THE JURY WAS NOT SUPPORTED BY THE EVIDENCE IN THAT IT FAILED TO ESTABLISH, WITH REASONABLE CERTAINTY, THE DEFENDANT'S NET WORTH AS OF DECEMBER 31, 1967.

There are a number of methods normally employed by the government in proving a tax fraud case—net worth method; specific items method; bank deposits method. Of these, the most frequently used is the net worth method. Because the specific facts of any given case may vary, derivatives of these standard methods have been developed. The most widely accepted variant is the "expenditure theory." The case expenditure theory "is a variant of the net worth method of establishing unreported taxable income." *Taglianetti v. United States*, 398 F. 2d 558, 562 (1st Cir., 1968). In the case at bar, the government has unequivocally stated in its bill of particulars its exclusive reliance upon the "expenditure theory" (A. 12).

In order to comprehend the expenditure theory, one must first have a working understanding of the net worth method as set forth by the Supreme Court in *Holland v. United States*, 348 U.S. 121; 75 S. Ct. 127; 99 L. Ed. 150 (1954). The court, in *Dupree v. United States*, 218 F. 2d 781 (5th Cir. 1955), an expenditure case, said,

"Much of what is said there [in the *Holland* case] is applicable to a prosecution in which the Government undertakes to prove that the taxpayer knowingly and willfully attempted to defeat and evade a large part of his income tax by showing that expenditures during the prosecution years in question exceeded the taxpayer's available funds."

The net worth method was simply and cogently explained by the court in *Talik v. United States*, 340 F. 2d 138, 139 (9th Cir. 1965) by stating:

"This method [the net worth method] . . . consists in showing that the net worth, on a cost basis, of the assets which the taxpayer owned at the end of a taxable year is greater than the net worth at the beginning of the year, and then adding to the difference the non-tax-deductible expenditures of the taxpayer made during the year. The sum of these two figures is treated as taxable income unless, by gift, devise, inheritance or other non-taxable acquisition, the taxpayer's net worth has been increased during the year."

The Supreme Court in *Holland v. United States*, *supra*, judicially approved the method by which circumstantial evidence would be used to reconstruct a taxpayer's actual income. In its decision, *Holland* enumerates certain requirements imposed upon the prosecution to validate and substantiate the accuracy of its reconstruction. An intricate step in the process by which a taxpayer's income would be reconstructed by circumstantial evidence is the establishment, with reasonable certainty, of a precise "opening net worth" at the commencement of the prosecution years. *Holland*, *supra*, at 134-135. The presentation of an accurate opening net worth is a fundamental and critical base upon which the accuracy of all future calculations will depend.

To ensure a reliable determination by the government in its process of reconstruction, the *Holland* Court further mandated that the government fully investigate "leads" furnished by the taxpayer. For, if true, they might adequately explain the taxpayer's increase in net worth. The Court said,

"When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer . . ."

Holland v. United States, supra, at 135-136.

An additional requirement placed upon the prosecution is the necessity of proving that all net worth increases are attributable to taxable income actually received in the prosecution year. Thus,

"Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income."

Holland v. United States, supra, at 136-137.

Each of the elements set forth above serves as a predicate for establishing the propriety in using the net worth method of proof for reconstructing a taxpayer's actual income. They are so interwoven that the absence of any one of the elements would so weaken the fabric upon which a verdict of guilty is predicated so as to make it meaningless. Cognizant of the inherent pitfalls in the use of circumstantial evidence as the sole method of proving guilt, the *Holland* Court admonished courts in the application of the net worth method by stating:

"Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumption on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Holland v. United States, supra*, at 129.

Thus, the defendant asserts that the relevance of evidence concerning expenditures during the prosecution years without first establishing an opening net worth would be abstruse, for it would be left to mere conjecture to determine if such expenditure were made from assets possessed prior to the prosecution years or from unreported taxable income received prior to the prosecution years.

"The first element that must be established in this type of prosecution [tax prosecution based on expenditure theory] is what funds are available to the taxpayer at the opening date of the prosecution year If there is no established figure showing the source from which expenditures during the year can be made, or the complete lack of such a source, then there is no relevance to proof of expenditures during the year, no matter how large they may be." *Dupree v. United States, supra*, at 784.

The Supreme Court in *Holland* stated,

"We agree with petitioners that an essential condition in cases of this type is the establishment, with

reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." *Holland v. United States*, *supra*, at 132.

Both before and after the Supreme Court's decision in *Holland* in 1954, numerous cases have come before the appellate courts dealing with the net worth and expenditure methods of proof. In each and every case presented, the courts have consistently affirmed the absolute necessity of establishing a defendant's opening net worth to serve as a base upon which all future calculations will be judged.

Judicial approval of the expenditure method of proof was set out by the Supreme Court as early as 1943 in *United States v. Johnson*, 319 U.S. 503; 63 S. Ct. 1233; 87 L. Ed. 1546 (1943). Thereafter, in 1952, the Third Circuit stated,

"The theory [expenditure theory] of it is simple It starts with an appraisal of the taxpayer's net worth situation at the beginning of a period. He may have much or he may have nothing. If, during that period, his expenditures have exceeded the amount he has returned as income and his net worth at the end of the period is the same as it was at the beginning (or any difference accounted for), then it may be concluded that his income tax return shows less income than he has in fact received." *United States v. Caserta*, 199 F. 2d 905, 907 (3rd Cir. 1952).

The logic of requiring a precise opening net worth is readily apparent. Since one of the fundamental elements of the crime charged is that the unreported taxable income be actually received in the year embraced by the indict-

ment, and since assets possessed and accumulated prior to the years embraced by the indictment are not taxable when taken from their storage place and spent (*United States v. Frank*, 245 F. 2d 284 (3rd Cir. 1957)), expenditures alone within a prosecution year are insufficient to prove guilt unless they are examined in relation to the funds available to the taxpayer at the beginning of the prosecution year. If funds do exist, it must be determined what effect, if any, the diminution of these prior assets may have had on the taxpayer's expenditures. *Taglianetti v. United States*, *supra*. See also, *Armstrong v. United States*, 327 F. 2d 189 (9th Cir. 1964).

The burden of establishing the defendant's opening net worth rests on the government, as all other elements involved in a criminal prosecution. The Supreme Court in *Holland*, at 138, speaking of the net worth method of proof and its requirement to establish a taxpayer's opening net worth, said,

"Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." *Holland v. United States*, 348 U.S. 121; 75 S. Ct. 127; 99 L. Ed. 150 (1954).

The need for a precise opening net worth is further apparent when viewed in conjunction with all the requirements placed upon the prosecution by the Supreme Court in *Holland*. The *Holland* case, and cases following it, established that once an excess in net worth is shown above reported income (or in an expenditure case, a total of expenditures exceeding reported income), it is incumbent upon the government to either show a likely source or to negate non-taxable receipts which could account for the discrepancy.

In the case at bar, the government did not attempt to show a likely source of unreported taxable income during or preceding the prosecution years. See, *United States v. Ford*, 237 F. 2d 57 (2d Cir. 1956). Also *Massei v. United States*, 241 F. 2d 895 (1st Cir. 1957). Evidence of the government's failure to establish a likely source is apparent from the trial record. On the fifth day of the trial, the assistant United States attorney brought to the court's attention his intention to present evidence of a likely source pursuant to *United States v. Ford*, *supra*. Although the assistant United States attorney said,

"Mr. Puccio: Your Honor, in U.S. v. Ford—I have given a copy to the defendant this morning, and I don't ask for a decision on this now—I point the court's attention to paragraphs 7 and 12 and ask Your Honor to note that we are considering offering testimony under U.S. v. Ford

"I put the defendant on notice and I bring to the court's attention that we are anticipating or considering offering testimony under U.S. v. Ford which is a Second Circuit case" (Tr. 778, 779).

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"Mr. Puccio: I will make an offer of proof at the proper time" (Tr. 783)—

an examination of the remaining trial transcript will unequivocally show that the assistant United States attorney never made his proffered offer of proof with regard to presenting evidence of a likely source. Nor, did he call any witnesses which would establish a likely source of the alleged unreported taxable income.

Thus, the only alternative, once it was allegedly established that the defendant's expenditures exceeded his reported income, was to negate the preexistence of non-

taxable or taxable income received prior to January 1, 1968 but expended subsequent thereto. As stated *supra*, prior accumulated assets, when surfaced during a prosecution year and spent, are non-taxable. Therefore, it was imperative for the government to negate the existence of assets possessed by the defendant at the commencement of the prosecution years and/or establish the precise amount of said assets and make clear the extent of any contribution which these resources or a diminution of resources could have made to expenditures. See, *Taglianetti v. United States*, 398 F. 2d 588, at 565 (1st Cir. 1968).

The court in *Dupree v. United States*, 218 F. 2d 781, 784 (5th Cir. 1955), stated:

"In order to prove a failure to report the full amount of income, the use of this particular method the Government must then show 'expenditures' during the year in excess of the two items mentioned above, i.e., available funds at the beginning of the year and funds becoming available during the year and which were reported on the tax return.

"The Government has still a further burden in this type of case. It is elementary that there are sources of funds that make their receipt non-taxable to the recipient. The Government, in proving its prima facie case must therefore exclude such sources of available funds by affirmative evidence."

In *United States v. Slutsky*, 487 F. 2d 832 (2d Cir. 1973), a tax prosecution involving the bank deposits method of proof, this circuit said, at 842:

"[T]he government must prove with reasonable certainty the amount of undeposited cash at the beginning of the year so that an appropriate amount may be subtracted from the total deposits made during the taxable year."

It is fundamental that a defendant in a tax prosecution is clothed with the constitutional privilege of being shielded against the requirement of giving evidence against himself. This constitutional prohibition is equally as viable in a tax prosecution with reference to the taxpayer being required to come forward and give evidence concerning the source of the funds used by him to account for his expenditures. *United States v. Penosi*, 452 F. 2d 217 (5th Cir. 1971). *United States v. Newman*, 468 F. 2d 791 (5th Cir. 1972).

Thus, pursuant to the proposition of law stated in the cases above, it is elementary that the government must establish an opening net worth at least with reasonable certainty and that the burden rests solely on the prosecution. The next avenue of inquiry must necessarily be the nature in which the government must present its opening net worth. In *Taglianetti v. United States*, *supra*, the court was presented with the problem of the type of the net worth statement that was needed in an expenditure case. The issue centered upon whether, as in a strict net worth case, a formal net worth statement establishing precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide for the critical subtraction. The *Taglianetti* court said, at 565:

"In a cash expenditure case reasonable certainty may be established without such a presentation, [i.e., a formal net worth statement] as long as the proof . . . makes clear the extent of any contributions which beginning resources or a diminution of resources over time could have made to expenditures."

The *Taglianetti* court did not dispense with the need for the establishment of an adequate opening net worth, but rather stated that the opening net worth could be provided through the testimony of the investigating Internal Revenue agent.

In the case at bar, the defendant contends that the government failed to establish with reasonable certainty the amount and nature of assets available to him at the commencement of the prosecution years, so as to negate beyond a reasonable doubt, the fact that any funds expended by the defendant during the years embraced by the indictment had not, in fact, been received by him prior thereto. The defendant submits that the absence of this element which is the foundation upon which the remainder of the government's evidence would be built, so weakened the structure of the government's case as to cause it to crumble and fall. The defendant suggests that the trial record must be examined in detail in order to determine if sufficient evidence was presented to the jury upon which they could reasonably conclude and determine the precise amount of assets available to the defendant at the commencement of the prosecution years. The evidence must also be examined to determine if there was sufficient testimony elicited during the trial in order to enlighten the jury concerning the effect any diminution of these assets may have had to the expenditures allegedly made by the defendant in the years embraced by the indictment. The defendant earnestly believes that a full and complete understanding and appreciation for the arguments made herein cannot be fully realized without resort to a thorough reading of the lengthy trial transcript. The defendant submits that it is difficult to glean from the testimony of the many witnesses called by the government, the absence of inquiries directed towards establishing the defendant's opening net worth. However, the defendant contends that an examination of certain portions of the trial record in conjunction with the testimony of specific witnesses from whom such testimony would normally be expected to flow, will give this court a clear and abundant indication that the element of defendant's opening net worth was not established with sufficient particularity as required by the cases cited herein.

Unlike most net worth or expenditure cases, the defendant was never questioned by the government to ascertain his net worth or available assets immediately prior to the prosecution years. The defendant was not requested to furnish the government with any "leads" to explain the source of funds from which his expenditures were made. As discussed above, the defendant was not required to come forward to explain the source of funds available to him at the commencement of the prosecution years. The burden of proof rested solely on the government to establish with reasonable certainty what, if any, funds were available to the defendant at the commencement of the prosecution years.

A strong indication of the government's failure to present an opening net worth is seen early in the proceedings by the government's response to defendant's bill of particulars. In his bill of particulars, the defendant requested the following information:

I.D. If the government intends to utilize the expenditure method, set forth with specificity:

- (1) The defendant's alleged net worth at the commencement and termination of the taxable period;

The government responded in its answer to the defendant's bill of particulars by saying:

D.1. Not applicable.

This action, the defendant contends, is consistent with his proposition that the government failed to establish with reasonable certainty his opening net worth upon which all future calculations would be based.

An examination of the assistant United States attorney's opening statement, the defendant submits, will show that the government's answer to the defendant's bill of particu-

lars, was not an inadvertent mistake. Nowhere in his opening statement does the assistant United States attorney discuss the establishment of a "starting point" and/or an opening net worth which could be used by the jury in comparing the expenditures alleged to have been made during the prosecution years with available resources. The assistant United States attorney stated the manner in which he would prove the government's case by saying:

"Now, specifically in this case, since it's an income tax case, there is a method employed which establishes income by circumstantial evidence. Now, you will hear from Judge Judd later that circumstantial evidence is equally valid as direct evidence.

"Now, we expect to prove the charges in this case by an analysis of the defendant's expenditures during the years in question. In other words, we expect to show his true income for 1968, 1969, 1970 and 1971, by showing how much he spent during those years and how he spent it.

"Now, I think that it will become abundantly clear to you when you have the evidence in showing how much the defendant spent, we are going to compare that to how much he said he made during those years in order to establish his true income. In other words, you—on the one hand—you are going to have a list of what he spent and in the other hand, you are going to have his income tax return showing what he made, and then the comparison of the two, and then with certain arithmetic deductions which the agents of the Internal Revenue Service will give you, a picture, I submit, of really what his income was during those years."

In the usual net worth or expenditure case, the government goes to great length to intensely scrutinize a taxpayer's

past financial history in order to buttress and lend credence to its assessment of the taxpayer's opening net worth. Normally, the investigator will begin by examining a taxpayer's earnings and expenditure history for many years prior to the years embraced by the indictment. The investigation will then proceed forward and focus upon the maximum amounts of money a taxpayer could reasonably accumulate during these years. In this manner, little is left to surmise concerning what, if any, assets the taxpayer had at the commencement of the prosecution years. An indispensable tool in this type of investigation would be a thorough examination of the taxpayer's prior income tax filings. The Internal Revenue manual specifically recommends this type of investigation in the preparation of a tax prosecution. Part 9, § 9327.1(4) states:

"In net worth tax cases, the taxpayer's filing record and copies of available income tax returns should be furnished for at least five years preceding and all years subsequent to the starting point to furnish additional support to the starting point."

None of the defendant's income tax returns for the years prior to the prosecution years were admitted into evidence, except 1967, which only purported to be income earned for that year and did not contain his net worth as of that date. An examination of the list of proposed exhibits presented to the court and the defendant's counsel prior to trial, is consistent with defendant's proposition concerning the lack of investigation regarding the establishment of a precise starting point since it is devoid of any exhibits which purported to be the defendant's income tax returns for the years prior to the prosecution years. The defendant submits that these facts are a strong indication that this type of investigation was not done and further supports the defendant's contention that the government failed to establish a precise opening net worth.

The defendant submits that the closest the prosecution came to meeting its burden with regard to establishing a precise opening net worth was in this exchange with the defendant's former wife, Joan Intrieri, that:

"Q: As of your divorce, which occurred in April of 1968, do you know, of your own personal knowledge, whether or not Mr. Intrieri, my client, had any sizable amount of cash available to him, whether it be in his house or in bank accounts or what have you?

"A. I know he had the house. I don't know what else he had" (Tr. 113, 114).

The defendant contends that this response was totally insufficient to serve as a factual base upon which the jury could reasonably conclude what, if any, assets the defendant possessed prior to the prosecution years.

The defendant contends that further credence is given to his contention by examining the statements made by the assistant United States attorney in support of his application to reopen the government's case-in-chief, as reflected at page 1139 of the trial transcript. Therein, the assistant United States attorney brought to the court's attention that there existed certain funds conceivably possessed by the defendant prior to the prosecution years. Further, he explained to the court that the government had failed to either explain the existence of these funds or to show the disposition of these funds in relation to the expenditures made by the defendant during the prosecution years. The assistant United States attorney specifically stated:

"well, in 1968 there was over \$1,000 in the Reliance Account and over \$1,000 in the Queens County Savings Bank Account. So, that's possibly \$2,000 non-taxable receipt in 1968, unless the government removes the inference by showing that these accounts remained with Joan Intrieri" (Tr. 1139).

The defendant submits that it was the obligation and burden resting upon the government to present these facts to the jury in its case-in-chief. Its failure to do so is but another indication of the inadequacy of the government's presentation of the defendant's opening net worth. It should be noted that it appears to be more than coincidental that these actions by the assistant United States attorney occurred after having been furnished with a copy of the defendant's motion for judgment of acquittal, which specifically set forth as its predicate the failure of the government to establish a precise opening net worth.

II. THE COURT IMPROPERLY DISCHARGED ITS JUDICIAL FUNCTION AND THEREBY DENIED THE DEFENDANT A FAIR TRIAL BY: (A) MAKING REMARKS IN THE PRESENCE OF THE JURY WHICH TENDED TO IMPLY THAT THERE EXISTED A BURDEN OF PROOF UPON THE DEFENDANT TO COME FORWARD WITH EVIDENCE TO PROVE THE EXISTENCE OF NON-TAXABLE INCOME RECEIPTS SUCH AS REPAYMENTS OF CAPITAL INVESTMENTS OR LOANS, ETC.; (B) CALLING TO THE GOVERNMENT'S ATTENTION, *SUA SPONTE*, POSSIBLE CAPITAL GAIN CONSEQUENCES OF A SPECIFIC TRANSACTION INVOLVING THE DEFENDANT DURING THE PROSECUTION YEARS AND THEREAFTER ALLOWING THE PROSECUTOR TO NEGATE AND CONTRADICT THE STIPULATION ENTERED INTO BY THE GOVERNMENT AND ACCEPTED BY THE COURT REGARDING THIS SAME TRANSACTION; (C) MAKING STATEMENTS IN THE PRESENCE OF THE JURY, IN THE NATURE OF TESTIMONY, CONCERNING CERTAIN OBLIGATIONS WHICH THE DEFENDANT MIGHT HAVE HAD TO FILING PARTICULAR SCHEDULES ON HIS INCOME TAX RETURNS; (D) CALLING TO THE GOVERNMENT'S ATTENTION THAT THE CHARTS PREPARED BY THE PROSECUTION, CONTAINING ALL ALLEGED EXPENDITURES

MADE BY THE DEFENDANT DURING THE PROSECUTION YEARS, CONTAINED NO FIGURES REFLECTING NECESSARY LIVING EXPENSES; (E) REFERRING IN ITS CHARGE TO THE JURY THAT THIS WAS AN UNUSUAL CASE BECAUSE OF THE COINCIDENCE OF THREE DIFFERENT PEOPLE WHO HAD CASH HOARDS.

1. The defendant contends that the trial court became an overzealous participant in the trial to the detriment of the defendant. It is readily conceded, as has long been recognized, that a trial judge in a criminal matter may take an active part in the criminal cause before him for the limited purpose of eliciting significant facts, enlightening issues, or facilitating the orderly and expeditious pace of trial. However, the judge's participation during trial must never reach the point at which it appears clear to the jury, that the court believes the accused is guilty. *United States v. Nazzaro*, 472 F. 2d 302 (2d Cir. 1973). Likewise, the trial judge "may not impose on a jury his own notion of which inferences are reasonable" from the evidence presented. *United States v. DeLoach*, 504 F. 2d 185, at 190 (D.C. Cir. 1974).

The trial judge must be ever-mindful of his function in a trial proceeding. He must be alert and cognizant of the subtle and real influence his honored and distinguished position has on the minds of the laymen on the jury. The United States Supreme Court noted long ago that,

"... under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626; 14 S. Ct. 919, 923; 38 L. Ed. 841 (1894).

The jury must at all times be shielded from the possibility of inferring from the trial judge's remarks that the

trial judge believes the defendant is guilty. Even where the judge's interjections are not motivated by a partisan purpose, he must not permit himself even the appearance of such an inference. An appearance of impartiality and judicious detachment must prevail at all times. *United States v. Curcio*, 279 F. 2d 681, 682 (2d Cir. 1960). See also, *United States v. Cuevas*, 510 F. 2d 848 (2d Cir. 1975). It goes without saying, as noted above, that the court can question witnesses:

"... but in so doing the court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that the defendant was guilty."

United States v. Hill, 332 F. 2d 105, 106 (7th Cir. 1964).

It is submitted that one of the true mysteries of life is the working of the jury's minds. What actions and utterances by the trial judge will create in their collective minds the impression that the court believes the defendant is guilty must be forever left to conjecture. However, it is respectfully submitted that:

"juries are highly sensitive to every utterance by the trial judge, the trial arbiter, and that some comments may be so highly prejudicial, that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error."

Bursten v. United States, 395 F. 2d 976, 983 (5th Cir. 1968), cited approvingly in *United States v. Stephens*, 486 F. 2d 915 (9th Cir. 1973), and *United States v. Martinez*, 496 F. 2d 664 (5th Cir. 1974). To forever foreclose the possibility of damaging the integrity of the truth-finding process by injecting the partiality of the trial judge into the deliberation of the jury, the trial court "would ordinarily do

well to forego such intrusion upon the functions of counsel" *United States v. Hill*, *supra*, citing *United States v. Carmel*, 267 F. 2d 345, 350.

The functions of the various participants in a criminal trial are delineated and appropriately distinguished for the proper administration of justice. Even though a trial is oft-times referred to as an adversary proceeding, the ultimate aim of all the participants is to ensure that justice is attained in accordance with the proper and lawful procedure set out in law. A trial judge must never assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the prosecution. *Hunter v. United States*, 62 F. 2d 217 (5th Cir. 1932). The innocent and good-faith intention of the trial judge is beside the question. It is basic to the fabric of our judicial system and vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted.

In the instant case, the trial court interjected itself into the proceedings as reflected at page 847 of the trial transcript. During cross-examination of the government witness by the defendant's counsel concerning certain checks which had been deposited in the defendant's bank accounts and the nature of those checks to determine whether they were taxable or non-taxable, the court, not hearing an objection by the United States attorney, stated:

"The Court: I don't hear anything from Mr. Puccio, but perhaps you will explain to the court how you can tell from the face of the check whether it is taxable or non-taxable?"

This question was directed to the defendant's counsel, who responded that if the check or a copy of the check were in existence, he could determine the payee and then

question the payee relative to the purpose for which the check was drawn and could thereby determine whether said assets were taxable or non-taxable. The defendant's counsel specifically gave examples of being able to determine whether said checks were repayment of capital investments, insurance endorsements, or loans. In response to this explanation, the court stated:

"The Court: I have not yet heard of capital investments of loans."

The defendant contends that this interjection by the court was an unnecessary intrusion upon the trial proceedings and tended to express the court's opinion to the jury that a burden of proof rested upon the defendant to prove the existence of non-taxable receipts. The defendant submits that the burden continuously remains on the government to negate the receipt of non-taxable assets which could be used as an explanation for the expenditures made during the prosecution years. This interjection by the court also had the effect of implying to the jury that the court disbelieved that any of the checks deposited into the defendant's account involved non-taxable receipts. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time, appear to the laymen on the jury to be impartial. *United States v. Hoker*, 483 F. 2d 359 (5th Cir. 1973). See also, *United States v. Pena-Garcia* 505 F. 2d 964 (9th Cir. 1974).

2. The defendant contends that the court again became embroiled in the trial process and usurped the function of the prosecuting attorney by his actions concerning the tax treatment to be afforded the proceeds received by the defendant by virtue of the sale of a piece of real property inherited by the defendant in 1948 and subsequently sold in 1971.

The government supplied the defendant with charts indicating the alleged expenditures and receipt of non-taxable income during the prosecution years. With regard to a sale of property inherited by the defendant, the government, during discovery, conceded that the receipts acquired by said sale would be credited to the defendant as non-taxable assets available to him for the expenditures alleged in the prosecution year 1971.

There was a discrepancy in the evidence concerning the exact amounts of money received by the defendant pursuant to this sale of property. The government called as its witness attorney Lawrence Berglass, the attorney who represented the defendant at the closing. After questioning attorney Berglass with regard to the monies received as a result of said sale, the government stipulated, in the presence of the jury, that whatever was received was non-taxable (Tr. 1018). At the conclusion of attorney Berglass' testimony, there still appeared to be a discrepancy as to the precise amount of money received by the defendant pursuant to this sale. During a court recess, the defendant's counsel and the prosecutor resolved the matter with regard to the exact monies received by the sale. The prosecutor again stipulated that the monies received from said sale were non-taxable assets. At the conclusion of the recess, the United States attorney put the stipulation on the record (Tr. 1028). The United States attorney stated:

"Mr. Puccio: We will stipulate that \$21,420.02 was received in 1971 by the defendant and it is non-taxable income" (Tr. 1028).

Thereafter, the court said:

"The Court: What was the tax base? How do you know it's non-taxable? What was the tax base?

"Mr. Puccio: We are going on the assumption that since inheritance is non . . .

"The Court: What was the tax base?"

In response to the court's remarks, the prosecutor asked to be relieved of his stipulation.

However, the court concluded discussion on this point by stating:

"The Court: It may have been a stipulation without actual factual base. But, if the government makes a stipulation, I will take it" (Tr. 1030).

Thus, although the stipulation between the parties with regard to the funds received from the sale of the real property located on East 221st Street had been twice entered upon the record and accepted by the court, the government was allowed to question Internal Revenue Service Agent Anthony Valenti and the tax expert called by the government concerning the possibility of the funds received pursuant to said sale not being entirely non-taxable. The questioning of Internal Revenue Service Agent Valenti with regard to the tax consequences of the funds received by the sale of the real property is reflected at pages 1082-1084 of the trial transcript. The testimony of the tax expert called by the government with reference to the tax treatment of the funds received from the sale of property located on East 221st Street is reflected at pages 1100-1106 of the trial transcript.

Thus, the government was allowed to contradict the stipulation into which they had entered upon the record; which stipulation had been approved by the court. The government continued to treat the entire amount received pursuant to said sale as a non-taxable receipt for the purposes of their calculations.

The defendant contends that neither he nor the assistant United States attorney possessed any unfair advantage nor peculiar knowledge when entering into the stipulation which was subsequently entered upon the record. The defendant further contends that the nature of the stipulation involved questions of fact rather than presumptions of law.

The defendant says that stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them. *United States v. 3,788.16 Acres of Land, More or Less, in Emmons County, North Dakota*, 439 F. 2d 291 (8th Cir. 1971). The defendant further says that the government should not normally be heard to contest facts formerly stipulated to. *Missouri-Illinois Railroad Company v. United States*, 381 F. 2d 1001, 180 Ct. Cl. 1179 (1967). Parties are generally bound by their agreements made in court. *Hoffman v. Celebrezze*, 405 F. 2d 833 (8th Cir. 1969).

Facts agreed to by both parties and established by stipulation are to be considered as facts without further evidence, and the trial court may not disregard these stipulated facts. *United States v. Sommers*, 351 F. 2d 354 (10th Cir. 1965). *Citizens' Acceptance Corporation v. United States*, 462 F. 2d 751 (3d Cir. 1972). *Worden v. Tri-State Insurance Company*, 347 F. 2d 336 (10th Cir. 1965).

The purpose of stipulation is to dispense with proof on stipulated issues and are controlling and conclusive, and a trial court is bound to enforce them. *Furniture Forwarders of St. Louis, Incorporated v. Chicago, Rock Island and Pacific Railroad Company*, 393 F. 2d 537 (8th Cir. 1968). *W. D. Rubright Company v. International Harvester Company*, 358 F. Supp. 1388 (W.D. Pa. 1973). *Stancil v. United States*, 200 F. Supp. 36 (E.D. Va. 1961).

See also, *United States v. Harding*, 475 F. 2d 480 (10th Cir. 1973); *F & D Property Co. v. Alkire*, 385 F. 2d 97 (10th Cir. 1967); *Jackson v. United States*, 330 F. 2d 679 (8th Cir. 1964).

The defendant further contends that this action by the court was unnecessary and was an intrusion and a usurpation of the prosecutor's function in the trial of this case.

3. The defendant vehemently asserts that the proper function of a trial judge in a criminal prosecution is to act as the arbitrator between the contesting parties. The defendant contends that the court should not lend the great weight of its esteemed office to either side in a criminal prosecution. The court must remain impartial. The defendant says that the trial court in the instant case again transgressed its judicial function by making statements in the presence of the jury, in the nature of testimony, when it stated:

"The Court: I am saying he should have filed Schedule D showing a gain or loss and that the failure to do so can be considered as bearing on his intent to file an honest return" (Tr. 1089).

This action by the court, without any prior testimony, explaining either capital gains, schedule D's, or the manner in which a capital gain would be normally reported, constituted testimony by the court adversely prejudicial to the defendant. The defendant strongly suggests that there can be no more forceful testimony in the eyes of the jury than that which comes from the court. The defendant contends that this action was improper and adversely prejudiced him before the jury.

4. A further example of improper judicial intervention occurred when the court, after having observed that the

expenditure charts intended to be offered into evidence by the government, sua sponte, stated,

"The Court: Why didn't you put living expenses on there? I don't see anything about heat, clothing or food . . ." (Tr. 1030).

The defendant contends that this action by the court is but another indication of judicial intervention concerning a fact or facts which the government had either intentionally overlooked or did not deem of sufficient importance to include in its expenditure charts.

5. The defendant says that the purpose of the court's charge to the jury is to instruct the jury with regard to the applicable law to be used in their deliberations. It is of extreme importance that the court conduct its charge in a fair and unbiased manner. The defendant submits that the court's remarks to the jury, saying that this was an unusual case with the coincidence of three persons having cash hoards, is but another indication of the court's partiality. The court's remarks implied to the jury the court's disbelief of the testimony which, if believed, would have vindicated the defendant.

The defendant says the actions of the trial court as enumerated herein, constituted improper judicial intervention and an usurpation of the prosecutor's function adversely prejudicing the defendant and denying him a fair trial.

III. THE COURT ERRED IN ALLOWING THE GOVERNMENT'S TAX EXPERT TO ANSWER A HYPOTHETICAL QUESTION CONCERNING THE POSSIBILITY OF A LONG TERM CAPITAL GAIN BEING DUE BY VIRTUE OF THE SALE OF REAL PROPERTY INHERITED BY THE DEFENDANT IN 1948 AND SUBSEQUENTLY SOLD IN 1971, A HYPOTHETICAL FOR WHICH THERE EXISTED NO EVIDENTIARY FOUNDATION.

As discussed above, in an effort to negate and contradict the stipulation into which the government had entered upon the record, the prosecutor was allowed to question the government's expert witness concerning the tax treatment to be afforded the proceeds received from the property inherited by the defendant and sold in 1971. The hypothetical question posed to the expert was phrased as follows:

"Question: Mr. Buchbinder, you are an expert, which has been conceded, in the computation of taxes, and I have one additional question for you. If an individual were to inherit property in 1948 which was valued in 1948 at \$5,600

"Question: Taking into consideration the property in 1948 inherited was worth approximately \$5,600 and that the same property was sold in 1971, some twenty-two years later, and at the time over \$20,000 approximately was received by the person selling it as profit, could you tell us if there was any tax due and owing based upon that transaction?" (Tr. 1100-1101.)

Over objection of the defendant's counsel, the witness was allowed to testify that this transaction involved a capital gain, and further that the capital gain should have been reflected by submitting a schedule D along with the defendant's income tax return in 1971. The court's attention is most respectfully directed to the trial transcript, at pages 1100-1106, wherein the entire nature of the tax treatment for the sale of the inherited property is covered.

The defendant asserts that the hypothetical questions posed to the expert were based upon the assumption, which said assumption was not supported by any evidence presented by the government, that there was an approximate \$20,000 profit realized pursuant to said sale. The hypothetical was also striking, the defendant submits, by the lack of relevant facts included in the hypothetical question. When hypothetical questions propounded to expert witnesses omit highly relevant facts, the answers are meaningless. *J. Gerber & Company v. S.S. Sabine Howaldt*, 437 F. 2d 580 (2d Cir. 1971).

The defendant contends that testimony of expert witnesses must be predicated upon facts offered in evidence at trial and assumed true for the purpose embraced in a hypothetical question. *Taylor v. B. Heller and Company*, 364 F. 2d 608 (6th Cir. 1966). When the basic foundation admissions are themselves conjecturally premised in connection with hypothetical questions, it would behoove the court to remove the answers from one of admissible opinion to one of excludable speculation. *Twin City Plaza, Inc. v. Central Surety and Insurance Corporation*, 409 F. 2d 1195 (8th Cir. 1969).

The defendant contends that a hypothetical question must state all the facts which an expert witness is entitled to rely upon. Otherwise, responses to said question render his opinion mere speculation. *Alman Brothers Farms & Feed Mill, Inc. v. Diamond Laboratories, Inc.*, 437 F. 2d 1295 (5th Cir. 1971). See also *Harris v. Smith*, 372 F. 2d 806 (8th Cir. 1967); *Logsdon v. Baker*, 366 F. Supp. 332 D. D.C. 1973).

The defendant contends that allowing the government's expert witness to testify in light of the circumstances expressed above constituted error, and that the opinion elicited adversely prejudiced the defendant.

IV. THE COURT ERRED IN PERMITTING THE GOVERNMENT TO INTRODUCE EVIDENCE OF ALLEGED SUBSEQUENT CONSISTENT ACTS IN YEARS NOT EMBRACED BY THE INDICTMENTS IN AN ATTEMPT TO RETROACTIVELY SHOW DEFENDANT'S WILFUL INTENT TO COMMIT THE ACTS ALLEGED IN THE INDICTMENTS.

In the instant case, the prosecutor brought to the court's attention two acts occurring subsequent to the years embraced by the indictments which he intended to introduce to retroactively show the defendant's criminal intent during the prosecution years. The prosecutor informed the court that he intended to introduce evidence concerning the purchase, in cash, of an automobile by the defendant in 1972. Concerning this evidence, the prosecutor stated:

"Mr. Puccio: I expect to offer this testimony because it involves the use of cash, which is a trade mark throughout" (Tr. 741).

He further explained the transaction by saying:

"Mr. Puccio: . . . It is a very simple transaction. The defendant went into a car dealer in the beginning of 1972, put down a deposit and then picked up a car within two months and paid cash and the cash did not come out of any of the bank accounts. . . ."

The second transaction involved the purchase of an automobile by the defendant in 1975. The prosecutor alleged that the defendant purchased this automobile from an acquaintance in Connecticut for a total price of \$8,750 and that he asked the seller to prepare an invoice for \$5,500, with the balance to be paid in cash. The prosecutor further alleged that subsequently, the automobile dealer who handled this transaction was telephoned by the defendant and requested to transmit to the defendant an additional invoice showing the full amount actually paid for the automobile. The prosecutor stated:

"This is offered for two reasons: First of all, it is offered to show the defendant's use of cash again. Second of all, it is to show guilty knowledge and it is to show intent. Clearly there is no other reason for this suspicious transaction other than the defendant's effort to avoid taxes. There is no other reason . . ." (Tr. 744).

The defendant contends that even though evidence of both subsequent transactions was ostensibly being offered retroactively to show the defendant's wilful intent during the prosecution years, its actual purpose was to alienate the jury by attempting to show the bad character of the defendant, thereby causing a "bad man conviction."

The prosecutor, in his offer of proof relative to both subsequent similar acts, stated that they were being offered for the purpose of showing defendant's consistent behavior of dealing in cash. However, during the presentation of the evidence relative to these transactions, the prosecutor far exceeded his stated purpose and brought before the jury extraneous matters which were highly prejudicial and damaging to the defendant.

With regard to government witness Joseph D. Wolff, office manager for the automobile dealership where the 1972 transaction took place, the prosecutor was allowed to ask and the witness permitted to answer that the defendant had requested that no dealership emblem be placed on the rear of his newly purchased automobile (Tr. 878). Even though the witness testified that this was not an uncommon practice, the prosecutor was attempting to show the defendant's "bad character" to the jury. This line of questioning exceeded the purpose for which the testimony of the transaction was being offered and had no probative value concerning the defendant's criminal intent for the prosecution years.

With regard to the transaction in 1975, the witness, who was the dealer who handled the transaction for the defendant with a private seller, after having testified to the circumstances surrounding the sale of the automobile, was allowed to testify concerning conversations between himself and the defendant at approximately the time the witness was served with a grand jury subpoena. The prosecutor attempted to elicit from the witness that he had been contacted by the defendant and questioned relative to his having received a subpoena to appear before the grand jury (Tr. 898-910).

The Federal Rules of Evidence, 404(b) forbids the admission of "evidence of other crimes, wrongs or acts" to prove character, but allows admission of such evidence to prove, *inter alia*, motive, intent, knowledge and absence of mistake. The advisory committee note to Rule 404 emphasizes that admissibility in the latter situation is discretionary with the trial judge, who, in compliance with the Federal Rules of Evidence 403 must determine whether otherwise relevant evidence should be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" It must be determined whether the testimony concerning the subsequent acts, including the extraneous matters exceeding the prosecutor's offer of proof, could be considered relevant on the question of the defendant's intent at the time of filing his tax returns for the years 1968 through 1971.

The federal rules define "relevant evidence" liberally as "evidence having any tendency to make the existence of any [material] fact . . . more probable or less probable than it would be without the evidence" (Federal Rules of Evidence 401).

The standard used by the court when determining the admissibility of subsequent similar acts is not simply relevance. The evidence must also be scrutinized in an attempt to determine whether the prejudicial effect of the evidence far outweighs its probative value. Assuming *arguendo* that the evidence stated in the prosecutor's offer of proof is relevant, it must then be determined (1) whether the post-crime evidence is really being used to prove character; (2) whether it has any significant probative value as to intent; and (3) whether there is danger of its prejudicing, confusing or misleading the jury.

The defendant contends this is the same standard used by the courts when judging the admissibility of prior or subsequent criminal conduct. The evidence must be viewed to determine if its probative value outweighs its prejudicial character. *United States v. Brettholz*, 485 F. 2d 483 (2d Cir. 1973). See also *United States v. Carter*, 482 F. 2d 738, 157 U.S. App. D.C. 149 (D.C. Cir. 1973).

With reference to the case at bar, the defendant respectfully directs the court's attention to this circuit's recent decision in the case of *United States v. Leonard*, 524 F. 2d 1076 (2d Cir. 1975). This court said (at 1091) that the probative value of similar acts used to prove wilfulness or intent is dependent upon existence of a close parallel between the crime charged and the act shown.

The defendant contends that the prejudicial effect of the testimony concerning the similar acts occurring in 1972 and 1975 so outweighed its probative value as to render its admission into evidence prejudicial error.

In the *Leonard* case, which involved a similar act which occurred approximately two years after the incidents alleged in the indictment, this court stated (at 1092):

"It would doubtless have been wiser for the judge to have excluded the evidence or, at the least, to have ex-

cluded it until after the presentation of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it."

The defendant contends that the same examination should have been conducted by the trial court in the instant case. See also *United States v. Kaufman*, 453 F. 2d 306 (2d Cir. 1971).

V. THE COURT ERRED BY ABUSING ITS DISCRETION IN ALLOWING THE GOVERNMENT TO REOPEN ITS CASE-IN-CHIEF, SUBSEQUENT TO THE CLOSE OF THE DEFENDANT'S CASE, IN ORDER TO PRESENT EVIDENCE ALLEGEDLY ESTABLISHING A "STARTING POINT" BY NEGATING ASSETS AVAILABLE TO THE DEFENDANT PRIOR TO JANUARY 1, 1968, WHICH MAY HAVE BEEN UTILIZED TO MAKE THE EXPENDITURES REFLECTED DURING THE YEARS EMBRACED BY THE INDICTMENTS.

On January 14, 1976, the government completed its case-in-chief and rested (Tr. 1108). Thereafter, the defendant filed a motion for a directed verdict of acquittal with the court and supplied a copy to the prosecutor. The defendant's counsel reserved argument on his motion in order to present the defendant's case (Tr. 1109). The defendant's motion set forth as its predicate the failure of the government's evidence to establish with reasonable certainty the defendant's net worth as of December 31, 1967.

The defendant called two witnesses for his defense. The first witness was an attorney who testified concerning a lawsuit which had been commenced against the defendant's brother, in support of the brother's testimony of his reluctance to deposit cash assets in banks for fear of attachment. The second witness testified concerning the existence of a metal box embedded in cement in the defendant's mother's home, in support of her testimony which referred to said

metal box as having contained a cash hoard. The next day, the defendant concluded the presentation of his evidence, and he rested his case (Tr. 1137).

The prosecutor then made a motion to reopen the government's case (Tr. 1137). The prosecutor's purpose for wanting to reopen was to present additional evidence to make clear the extent of any contributions which specific resources possessed by the defendant prior to the years embraced by the indictments could have made to expenditures alleged during the prosecution years, i.e., establish an opening net worth (Tr. 1139-1140). The government wished to offer records of two bank accounts which had been available to the defendant prior to the prosecution years. No evidence had been elicited concerning these bank accounts in the government's case-in-chief. One set of bank records had been marked for identification by the prosecutor, but never offered into evidence. The second set of bank records had neither been marked for identification, nor offered into evidence by the government (Tr. 1138).

The defendant's objection was based upon his contention that the evidence sought to be introduced was not proper rebuttal of evidence submitted by the defendant. The court stated that it did not make a distinction between rebuttal and reopening (Tr. 1141).

The defendant says that the determination of whether to allow the government to reopen its case after the defense has concluded its presentation of evidence is within the sound discretion of the trial court. *United States v. Young*, 488 F. 2d 1211 (8th Cir. 1973). Also, *United States v. Suarez*, 487 F. 2d 236 (5th Cir. 1973); *United States v. Skolek*, 474 F. 2d 582 (10th Cir. 1973). The defendant says that the standard used by the court in making its determination is whether allowing the government to reopen and present additional evidence will adversely prejudice the defendant. *United States v. Cephas*, 372 F. Supp. 1225 (E.D. Pa. 1974).

In the case at bar, the defendant says that allowing the government to reopen its case after the prosecutor had been furnished with the defendant's motion for a judgment of acquittal was improper and adversely prejudiced the defendant. In support thereof, the defendant says that the additional evidence offered by the government dealt specifically with the propositions of law raised in the defendant's motion for a judgment of acquittal and was an attempt to counteract said motion. The defendant submits that the evidence presented by the prosecution when it was allowed to reopen its case was an attempt to "shore up" its case with regard to the insufficiency of evidence pertaining to an "opening net worth," which issue had been formulated by the defendant's motion for a directed verdict of acquittal at the close of the government's case-in-chief.

VI. THE COURT ERRED IN ALLOWING THE PROSECUTOR IN HIS REBUTTAL SUMMATION, TO REFER TO THE DEFENDANT'S CONSTITUTIONAL ELECTION NOT TO TESTIFY.

The defendant's counsel in his summation, argued that:

"... even if you are convinced beyond a reasonable doubt that the defendant received income upon which he did not pay taxes, if you have a reasonable doubt as to whether or not such unreported income was received by him prior to January 1, 1968, you must find him not guilty" (Tr. 1249).

In rebuttal, the prosecutor stated to the jury:

"Have you heard any evidence that the defendant evaded his income tax in prior years and the money that he spent during the years in question, there is nothing like that in the record . . ." (Tr. 1257).

The defendant submits that the only person who could reasonably be expected to offer evidence of the nature expressed in the prosecutor's statement would be the defendant. Therefore, the statements by the prosecutor constituted a blatant reference by him concerning the defendant's constitutional election not to testify. The defendant submits that the nature of this remark was such that it would naturally and necessarily be interpreted by the jury as a reference to the defendant's election not to testify. See *United States v. Dioguardi*, 492 F. 2d 70 (2d Cir. 1974).

The defendant submits that it is prejudicially improper for the prosecutor to make any remarks which would reflect upon a defendant's election not to testify. *Griffin v. California*, 380 U.S. 609; 85 S. Ct. 1229; 14 L. Ed. 2d 106 (1965).

When comment is made upon a defendant's election not to take the witness stand, the trial court should normally condemn such reference and express to the jury in emphatic terms that they should not attach any importance to his failure to testify. *United States v. Knox Coal Company*, 347 F. 2d 33 (3d Cir. 1965).

In the instant case, the instructions given by the court in response to the defendant's counsel's objection, as reflected at page 1257 of the trial transcript, were totally insufficient to cure the prejudice caused by the prosecutor's remarks. In any event, whatever curative effect the court's remarks had on the jury was obviated by the prosecutor, in substance, reiterating his remark immediately thereafter. See trial transcript, page 1258.

The defendant says that the prosecutor's remarks viewed in conjunction with the court's non-curative instruction adversely prejudiced the defendant in the eyes of the jury.

Conclusion.

For the various reasons set forth above, the defendant-appellant states that his conviction should be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE.

I, Henry M. Quinlan, hereby certify that two copies of the foregoing brief and appendix in United States Court of Appeals for the Second Circuit (No. 76-1109), United States v. Pasquale Intrieri, was served upon counsel for the appellee, Thomas Puccio, Assistant United States Attorney, 225 Cadman Plaza East, Brooklyn, New York, on this third day of May, 1976 by depositing same in the United States Mails, postage prepaid.



Henry M. Quinlan
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Then personally appeared before me the above-mentioned Henry M. Quinlan and made oath to the truth of the above-affidavit by him subscribed this 3rd day of May, 1976.



Regina L. Quinlan
Notary Public
My commission expires on:
9-29-78.